

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

FRED HENGST,)	
)	
)	DOCKET No. 13-03-582
v.)	13-03-583
)	13-03-584
DEPARTMENT OF TECHNOLOGY)	
AND INFORMATION,)	DECISION AND ORDER
)	
)	
)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on November 20, 2014 in the Delaware Public Service Commission Hearing Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, and Victoria Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Treasury

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument from the Department of Technology and Information (“DTI”) on its motion to dismiss the three appeals of the employee/grievant, Fred Hengst (“Hengst”) for failure to state a claim for which relief may be granted and mootness. DTI attached to its motion: the decision and order of this Board (Docket No. 13-01-577) for an appeal filed by Hengst regarding his termination; a letter dated April 8, 2014 from Kimberly Thornton to Mr. Kevin Slattery; a copy of Mr. Hengst’s pay invoice for the pay period ending January 12, 2013; and a letter dated January 22, 2013 from Danka Prilepkova to Mr. Hengst. Mr. Hengst did not file a written response to the motion to dismiss nor did Hengst appear for the hearing.

For administrative convenience, the three appeals were considered on the same day, but the merits of each were considered independently. This decision addresses each appeal.

FINDINGS OF FACT

Hengst was employed by DTI as an Application Support Project Leader/Information Security Officer from July 5, 2012 until he was dismissed on January 4, 2013. Hengst appealed his termination to this Board and by order dated August 4, 2014 (Docket No. 13-01-577) the Board upheld DTI’s decision to terminate Hengst.

After DTI notified him of its intent to terminate his employment on December 10, 2012, but prior to his January 4, 2013 termination date, Hengst filed three grievances: 13-03-582, 13-03-583 and 13-03-584. The first appeal (13-03-582) objected to a written reprimand Hengst received for being absent from work on October 29 and October 30, 2012. DTI later realized these two days corresponded with the days non-essential State employees were not required to report to work due to inclement weather caused by Hurricane Sandy. The discipline was subsequently rescinded and removed from his personnel file.

The second appeal (13-03-583) objected to DTI's denial of Hengst's request to carry over excess annual leave by its Chief Executive. Upon Hengst's termination, he was paid for excess leave.

The third appeal (13-03-584) objected to Hengst not being invited to the DTI Christmas party. At the Step 1 meeting, Hengst's supervisor offered to provide him with compensatory time of his choice equal to that afforded to party guests who were given an early dismissal. Hengst rejected that offer.

CONCLUSIONS OF LAW

The Board concludes as a matter of law that Hengst's appeals are moot because there is no longer any case or controversy.

The issue of mootness has been discussed by this Board in *Reyes v. Department of Finance* (Docket No. 12-09-559). "The general rule is that a case becomes moot 'when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome.'" *Grievance of Moriarty*, 588 A.2d 1063, 1064 (Vt. 1991). "A controversy must remain alive through the course of appellate review." *Moriarty*, 588 A.2d at 1064. "Even though there was once an actual controversy, a change in the facts can render an issue or entire case moot." *Id.*

As to grievance appeal 13-03-582, the matter is moot as DTI rescinded the reprimand and removed it from his personnel file; consequently, Hengst suffered no retaliation in relation to his termination as that matter has already been addressed by this Board.

As to grievance appeal 13-03-583, the matter is moot as Hengst received a pay-out for his accrued leave, including the excess annual leave amount he wished to carry over to the next year following his termination.

As to grievance appeal 13-03-584, the matter is moot because an invitation to the

Christmas party is not a matter that is covered under the Merit Rules.

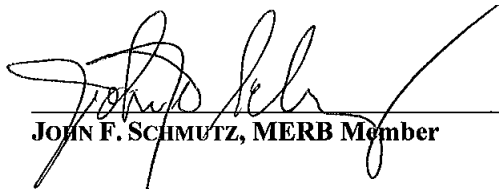
The Board concludes as a matter of law that it does not have subject matter jurisdiction over Hengst's three appeals because the grievances are moot.

ORDER

It is this **22nd** day of **January, 2015**, by a unanimous vote of 3-0, the Decision and Order of the Board to dismiss Hengst's appeals for lack of jurisdiction. Because there is no longer any actual case or controversy, his grievances are moot.



MARTHA K. AUSTIN, MERB Chairwoman



JOHN F. SCHMUTZ, MERB Member



VICTORIA D. CAIRNS, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: January 22, 2015

Distribution:

Original: File

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Agency's Representative
Board Counsel
MERB website